

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DAVID WEBSTER,

Petitioner,

vs.

JEFF UTTECHT,

Respondent.

NO. CV-07-5024-EFS

**ORDER DENYING PETITIONER'S THIRD
AMENDED PETITION UNDER 28 U.S.C. §
2254 FOR WRIT OF HABEAS CORPUS BY
A PERSON IN STATE CUSTODY**

Before the Court is Petitioner David Webster's Third Amended Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody ("the Petition"). (Ct. Rec. 39.) Mr. Webster challenges his 2003 state court convictions for solicitation and assault on the grounds that (1) his due process rights were violated by the state charging him with both rape and assault, (2) the admission of the evidence obtained from the undercover officer's body wire was unconstitutional, (3) the undercover recording in the jail violated *Miranda*,¹ (4) the undercover officer committed perjury, (5) the undercover officer violated Mr. Webster's Sixth Amendment right to counsel, and (6) joinder of the solicitation offense with the other counts violated Mr. Webster's due process rights. Respondent Jeff

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

1 Uttecht opposes the Petition. (Ct. Rec. 56.) After reviewing the
2 submitted material and relevant authority, the Court is fully informed
3 and denies the Petition for the reasons set forth below.

4 **A. Procedural Background**

5 On A jury acquitted Mr. Webster of rape but convicted him of second
6 degree assault and solicitation to commit first degree murder. (Ct.
7 Rec. 58 Ex. 1.) Mr. Webster, both through counsel and *pro se*, filed a
8 direct appeal. *Id.* at Exs. 3 & 4. The Washington Court of Appeals
9 affirmed the judgment and sentence. *Id.* at Ex. 2. Mr. Webster's
10 petition for discretionary review was the denied by the Washington
11 Supreme Court. *Id.* at Exs. 6, 7, & 8. On February 7, 2006, the
12 Washington Court of Appeals issued its mandate. *Id.* at Ex. 9.
13 Mr. Webster's motion for reconsideration was not acted upon by the
14 Washington Supreme Court because a denial of a petition for review is
15 not subject to reconsideration. *Id.* at Exs. 10 & 11.

16 Mr. Webster then filed a Personal Restraint Petition (PRP) on
17 February 16, 2008, in the Washington Court of Appeals. *Id.* at Ex. 12.
18 The Washington Court of Appeals denied relief on each of the grounds
19 raised by Mr. Webster. *Id.* at Ex. 14. The Washington Supreme Court
20 denied review of Mr. Webster's motion for discretionary review. *Id.* at
21 Exs. 15, 16, & 18. Mr. Webster then moved to modify this denial of
22 review; this motion was also denied. *Id.* at Exs. 20 & 21. The
23 Washington Court of Appeals issued a certificate of finality on January
24 3, 2007. *Id.* at Ex. 22.

25 Mr. Webster proceeded to file a second PRP in May 2007. *Id.* at Ex.
26 23. The Washington Court of Appeals dismissed this second petition as
27

1 barred under RCW 10.73.140. *Id.* at Ex. 24. Mr. Webster filed a Motion
2 for Discretionary Review with the Washington Supreme Court; the
3 Washington Supreme Court Commissioner denied review. *Id.* at Exs. 25-27.
4 Mr. Webster's motion to modify the Washington Supreme Court Commissioner
5 denial was also denied. *Id.* at Exs. 29, 30, & 31. The Washington
6 Court of Appeals issued a certificate of finality on October 29, 2007.

7 Mr. Webster filed his habeas petition on May 3, 2007.

8 **B. Standard**

9 A person in custody pursuant to a state court judgment can request
10 a federal court to determine if his custody is in violation of the
11 United States Constitution pursuant to 28 U.S.C. § 2254. One
12 requirement, however, is that the petitioner must exhaust his remedies
13 available in state court.² *Id.* § 2254(b)(1); *Duncan v. Henry*, 513 U.S.
14 364, 365-66 (1995) (requiring state court to have opportunity to address
15 and correct alleged violations of the prisoner's federal rights).
16 Further, to be successful, the petitioner must show that the state court
17 decision (1) was contrary to, or involved an unreasonable application of
18 clearly established federal law or (2) resulted in a decision that was
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20 ² Washington state provides two avenues of relief for state
21 prisoners: direct appeal and collateral review through a personal
22 restraint petition. The Court finds that the exhaustion requirement,
23 which serves the law of comity, is satisfied when an issue is presented
24 to both the court of appeals and the state supreme court during either
25 the direct appeal or the personal restraint petition. *See Washington v.*
26 *McFarland*, 127 Wn.2d 322, 335 (1995).

1 based on an unreasonable determination of the facts in light of the
2 evidence presented in the state court proceedings. 18 U.S.C. § 2254(d).
3 The state court ruling is presumed correct and the petitioner has the
4 burden of rebutting the presumption of correctness by clear and
5 convincing evidence. *Id.* § 2254(e)(1); *McKenzie v. McCormick*, 27 F.3d
6 1415, 1418-19 (9th Cir. 1994).

7 **C. Analysis**

8 The Court finds Mr. Webster failed to present his first (joinder of
9 rape and assault charges violated due process) and sixth (joinder of
10 solicitation charge with other charges violated due process) claims as
11 federal claims to the Washington Court of Appeals and the Washington
12 Supreme Court during either his direct appeal or the first PRP. Because
13 Mr. Webster did not present these claims to both state court levels, he
14 failed to provide the state court with an opportunity to correct federal
15 law violations. Accordingly, the Court finds Mr. Webster failed to
16 properly exhaust claims one and six. Because these claims are now
17 procedurally barred under RCW 10.73.090, Mr. Webster is not entitled to
18 habeas corpus relief on these claims.

19 The Court finds Mr. Webster presented the remainder of his claims
20 to both the Washington Court of Appeals and the Washington Supreme Court
21 during his first PRP. Accordingly, the Court addresses the merits of
22 claims two through five mindful that this is a habeas corpus proceeding
23 and not direct review of Mr. Webster's criminal convictions. As the
24 Supreme Court has reminded, different principles apply on collateral
25 review:

26 Direct review is the principal avenue for challenging a
27 conviction. 'When the process of direct review . . . comes to

1 an end, a presumption of finality and legality attaches to the
2 conviction and sentence. The role of federal habeas
3 proceedings, while important in assuring that constitutional
rights are observed, is secondary and limited. Federal courts
are not forums in which to relitigate state trials.'

4 *Swan v. Peterson*, 6 F.3d 1373, 1378 (9th Cir. 1993) (quoting *Brecht v.*
5 *Abrhamson*, 507 U.S. 519 (1993)). As stated above, this Court may
6 reverse a state court decision only if that decision:

7 (1) resulted in a decision that was contrary to, or involved
8 an unreasonable application of, clearly established Federal
9 law, as determined by the Supreme Court of the United States;
or

10 (2) resulted in a decision that was based on an unreasonable
11 determination of the facts in light of the evidence presented
in the State court proceeding.

12 28 U.S.C. § 2254(d)(1), (2). Because the Washington Court of Appeals'
13 decision on Mr. Webster's first PRP was the last decision to address the
14 merits of the issues raised by Mr. Webster's second through fifth
15 claims, the Court reviews this decision with the above standard in mind.
16 For the reasons given below, the Court finds Mr. Webster failed to rebut
17 the presumed correctness of the Washington Court of Appeals' decision.

18 In his second, third, and fifth claims, Mr. Webster challenges the
19 admission of the evidence obtained from the undercover officer, and the
20 body wire, on the grounds that such evidence was obtained in violation
21 of *Miranda* and the Sixth Amendment right to counsel. However, "[a]n
22 undercover law enforcement officer posing as a fellow inmate need not
23 give *Miranda* warnings to an incarcerated suspect before asking questions
24 that may elicit an incriminating response." *Illinois v. Perkins*, 496
25 U.S. 292, 299 (1990). In addition, because Mr. Webster's Sixth Amendment
26 right to counsel attached only to the charged offense - rape -, he did
27 not have a Sixth Amendment right to counsel relating to the then

1 uncharged offenses of solicitation and assault. See *Texas v. Cobb*, 532
2 U.S. 162, 172-73 (2001). Plus, the Washington Court of Appeals noted
3 that any error in admitting the assault-related statements was harmless
4 because Mr. Webster testified at trial that he bit the woman. (Ct. Rec.
5 58 Ex. 14 pp. 8-10.) Accordingly, with respect to claims 2, 3, and 5,
6 the Court finds Mr. Webster failed to show that the Washington Court of
7 Appeals' decision was contrary to, or an unreasonable application of,
8 federal law.

9 In his fourth claim, Mr. Webster argues the prosecutor failed to
10 correct the undercover officer's perjury. Federal law requires a
11 conviction to be set aside if a prosecutor knowingly uses perjured
12 testimony and there is a reasonable likelihood that this false evidence
13 could have affected the jury verdict. *United States v. Bagley*, 473 U.S.
14 667, 678-80 (1985). Here, the Washington Court of Appeals denied relief
15 because the prosecutor's statement regarding inconsistent statements was
16 ambiguous and, in fact, a reasonable interpretation led to the
17 conclusion that the prosecutor was referring to the fact that Mr.
18 Webster's - not the officer's - testimony was inconsistent with his
19 recorded statements. Moreover, the Washington Court of Appeals noted
20 that the tape was not played for the jury. Mr. Webster failed to
21 establish that the state court decision on this point was contrary to,
22 or involved an unreasonable application of, clearly established federal
23 law.

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1 **D. Conclusion**

2 Accordingly, **IT IS HEREBY ORDERED:**

3 1. Mr. Webster's Third Amended Petition Under 28 U.S.C. § 2254
4 for Writ of Habeas Corpus By a Person in State Custody (**Ct. Rec. 39**) is
5 **DENIED.**

6 2. Judgment shall be entered in Respondent's favor.

7 3. This file shall be **CLOSED.**

8 **IT IS SO ORDERED.** The District Court Executive is directed to
9 enter this Order and forward a copy to Petitioner and counsel.

10 **DATED** this 1st day of August 2008.

11
12 S/ Edward F. Shea
13 EDWARD F. SHEA
14 UNITED STATES DISTRICT JUDGE

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